IN CORPORATION COURT OF DANVILLE.

NATIONAL FIRE INS. CO. V. CATLIN.

1. CUSTOM—*Principal and agent—Insurance agents—Ownership of policy registers.* A custom in contravention of the common law is void, and evidence of the same is not admissible to change the legal rights of parties. Where an insurance company delivered to its local agent books in which, as such agent, he was to register and record policies of insurance issued through his agency, and to make other entries therein relative thereto, and which he has used for that purpose, such books belong to the company, and at the termination of the agency it is entitled to them. A custom among agents to retain such books after such termination, as their own, is void as against the law, and evidence of such custom is inadmissible.
2. PARTIES—*Non-joinder of defendants—Plea in abatement.* In an action of detinue, the defense that the party sued does not alone detain the property, but does so in conjunction with another party who it is claimed should have been made a party to the suit, cannot be made under the general issue, but must be made by plea in abatement.

Green, Withers & Green, for the plaintiff.

Peatross & Harris, for the defendant.

This was an action of detinue brought by the plaintiff against the defendant. The defendant had occupied the position of agent to the plaintiff company and there had been delivered to him certain books to be used in his principal's business. At the termination of the agency, these books were demanded by the plaintiff, but the defendant refused to deliver the same to it on the ground that by a custom prevailing among insurance companies and their agents, he was entitled to retain the same.

AIKEN, Judge:

The parties to this action stand in the relation of principal and agent to each other.

The plaintiff is the National Fire Insurance Company, of Hartford, Conn., and the defendant James T. Catlin is, or was, its agent in Danville, for soliciting and receiving, for compensation, applications for insurance risks against fire upon buildings in Danville, his service beginning in 1890.

At the beginning of the relation between the parties, or during its continuance, the principal delivered to the agent, two books known as "Policy Registers," each having 150 double pages, each

page containing the printed name of the principal, the Insurance Company, and each book bound in leather and cloth and stamped upon the backs and sides in large gilt letters is the name of the said National Fire Insurance Company of Hartford. Upon delivery of these books, the defendant as agent gave to the Company a receipt for them. The books were blank when delivered to the agent, but they were intended for registering policies which might be issued by the Company through the agent securing them, and they do now with others not in question contain a record of all the policies of insurance upon buildings in Danville issued by the plaintiff Company, through its agent, Mr. Catlin, from the time he entered the Company's service in 1890, to the time he retired in 1901, showing the number, date, and amount of the policies, the name of the insured, the property covered and the date of the expiration of the policies.

The entries in these books or "copies of the policies," as they were called by the witnesses, were made upon the dates on which the several policies were issued, and a copy of each of the policies was mailed on the date of the entry, to the Company at its principal office in Hartford. These books are alleged to be in the possession of the agent, Mr. Catlin, and that he refuses to deliver them, and the action is brought to recover them from him by process of law.

The agent, Mr. Catlin, makes defence upon two grounds, one upon the merits and the other technical.

Upon the merits he says the books contain a record of his own business, and are of great value to him; and that as the Insurance Company has received from him at different times and now has in its possession copies of all the policies registered in the books, the books are of no value to the Company. He further says, upon this defense, that when the books were delivered to him by the Company, they were received subject to a custom, well known to exist between Insurance Companies and their agents, that upon the termination of such relation between them, such books should be retained by the agents, and by virtue of this custom he has the right to keep the books, and they cannot be recovered of him. In other words, the defense upon the merits is that the books are the defendant's own property, and not the property of the plaintiff, the Insurance Company. Whether the books can be put to any use by either one of the parties is an immaterial point of inquiry. They certainly have value. Mr. Catlin testifies that they are of great value to him, and

Mr. Stillman that they are of great value to the Company; but it is apparent from the evidence and the books themselves, that they are of value to the plaintiff, because they contain in a permanent and compact form the original record of the plaintiff's business transacted by Mr. Catlin during the term of his agency. The fact that the plaintiff may have separate copies of the records registered in the books, may lessen, but it does not deprive these collected and embodied records of any value. Duplicates may be needed, and many business houses do keep duplicates of their records.

Several reasons might be given why they are of value to the plaintiff, but I do not consider the question of value material in deciding upon the ownership of the books. The court should not determine the title to property by the degree or extent of its value to the owner.

The question is, to whom do the books belong?

The books were made for registering the business of the plaintiff and could not well be used for any other purpose, as an inspection of them will show. They were bought and paid for by the plaintiff, and are stamped as indicated above on the backs and sides and on every page with the plaintiff's name, and their contents consist of the exclusive record of the plaintiff's contracts of insurance.

They were delivered by the Insurance Company to the defendant as its agent to be used about its business, and they were so used. The title to the books was in the plaintiff when they were delivered to the defendant, and remained in it during the period of the relation between the parties, and is still in the plaintiff, unless it has been transferred to the defendant by the force and virtue of the custom relied upon. It is unnecessary to discuss the doctrine of custom, or to discriminate the cases in which the courts take notice or receive evidence of it to explain the intention of parties as to how the contract is to be executed, or how the parties are to proceed under the contract, when these do not appear from the contract itself. But I do not know of any case in which a custom has been permitted to transfer the title to property from one person to another, and I feel advised that the law is to the contrary and will not allow it for that purpose. If a precedent against it need be cited, I think it can be found in the case of *Delaplane* v. *Crenshaw & Fisher,* 15 Gratt. 457, in addition to the following citations of the counsel: *Ferguson* v. *Gooch,* 94 Va. 1; *Southwest Va. M. Co.* v. *Chase,* 95 Va. 56; *Dickinson* v. *Gay,* 7 Allen (Mass.) 29, 83 Am. Dec. 656;

Mcht. Ins. Co. v. *Prince* (Minn), 36 Am. St. Rep. 626; *Dempsey* v. *Dobson,* 40 L. R. A. 550; *Barnard* v. *Kellogg,* 10 Wall. 390.

It would only be by this unwarranted extension of the power of a custom that the title of the plaintiff in the books could be transferred from the plaintiff to the defendant, Mr. Catlin.

I do not think evidence of custom can be received and used to effect the right of ownership in the books, and therefore it still remains in the Insurance Company.

The other defense is that the books are proved to be in the possession of J. T. Catlin & Son, a firm composed of J. T. Catlin and W. G. Catlin, and therefore a judgment that J. T. Catlin unlawfully detains them cannot be rendered against the latter. The reply of the plaintiff to this defense is good. The defense suggests that someone else should be joined in the suit with the defendant, J. T. Catlin, to recover the books, and it is therefore a defense that abates, and does not go to the suit upon its merits. All such defenses must be made by plea in abatement, and such a plea cannot be used after the defendant has demurred, pleaded, or answered to the declaration or bill, nor after a conditional judgment at rules. The Code sec. 3260 as amended by the act of February 1, 1898. These views dispose of the case and the result is that judgment for the books should be entered against the defendant.

NOTE.—This case involves the somewhat novel question of the ownership of policy registers, furnished by fire insurance companies to their local agents. The decision will be of interest to the insurance world.